JD-25-22
Indianapolis, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CAPITOL STREET SURGERY CENTER, LLC,
Respondent

and Case 25–CA–271204

MARTIN LAUSTER, an Individual,
Charging Party

Ashley M. Miller, Esq.,
for the General Counsel.
Gregory W. Guevara, Esq.,
for Respondent.
John R. Panico, Esq.,
for Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried virtually in the Zoom for Government platform from July 13 to July 15,2021, before Judge Elizabeth Tafe. Briefs were submitted on August 19, 2021. On April 25, 2022, Judge Tafe left the Division of Judges without issuing the decision in this case and is thus unavailable to complete the decision, within the meaning of Rule 102.26(b) of the Board's Rules and Regulations. The parties agreed that a newly appointed judge could issue the decision on the record made before Judge Tafe. I was subsequently assigned the case to write the decision.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging employee Martin Lauster for raising concerns, in an employee meeting, about which employees could use certain equipment, a protected activity under the Act. On the second day of the trial, the General Counsel was permitted to amend the complaint to add another allegation that Respondent had violated Section 8(a)(1) by interrogating employees during trial preparation without giving the appropriate warnings and safeguards under *Johnnie's Poultry*, 146 NLRB 770 (1964). See Tr. 272-281. Respondent denied the essential allegations in the complaint.

Based on the filed briefs and the entire record, including the testimony of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability corporation with an office and place of business in Indianapolis, Indiana, operates an ambulatory outpatient surgery center. During a representative one-year period, Respondent, in conducting its operation as above described, derived gross revenues in excess of $250,000 and purchased and received, at its Indianapolis facility, goods valued in excess of $5,000 directly from points outside Indiana. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Respondent employs some 25-27 employees at its ambulatory outpatient surgery center. Those employees include administrative and support staff, doctors, nurses, and interventional radiologic technologists (IR Techs). Tr. 21-22, 550-551. Dr. Sanjay Mohindra is the only interventional radiology doctor at the center, although he is not an employee of Respondent. Tr. 407, 550. Brandon Ehret, who has no medical or clinical background (Tr. 28-29), is Respondent's administrator, with overall responsibility and authority over the employees and related personnel matters. Tr. 21-23. He is an admitted supervisor and agent.

Interventional radiology procedures are part of a group of surgeries performed at Respondent's facility and they are performed in two of the four operating rooms at the facility—Rooms 3 and 4. Tr. 484. The procedures require the utilization of IR Techs, who are primarily responsible for running the C-arm, which is a radiation machine that provides x-ray images. Tr. 111, 229, 443, 516. They are the only employees registered and licensed to use the C-arm and the license is required as part of the Respondent's employment process. Tr. 49, 111-112, 229. One of a number of IR Techs employed by Respondent until his termination on November 18, 2020, was Martin Lauster.

Lauster and the other IR Techs report to Lead IR Techs Danielle Mohindra, Dr. Mohindra's wife, and Jenny Lozano, who assign the IR Techs their work and provide written evaluations of the IR Techs that are used in connection with promotions and disciplinary actions. They also set the hours, schedule shifts, including starting and ending times, and make room assignments for the IR Techs; and they approve vacation dates and time off requests for the IR Techs. Tr. 27-30, 115, 441-446, 513-517. The employee handbook (G.C. Exh. 2) confirms that those who advise employees of their scheduled shifts and starting and ending times are supervisors. And Mohindra conceded that no one else is involved in the scheduling process. Tr. 445. There is thus

no doubt that Mohindra and Lozano assign work to employees and responsibly direct them beyond what would be routine or clerical in nature, using independent judgment within the broad meaning of two of the specific definitions of a supervisor in Section 2(11) of the Act. Their responsibility in writing evaluations for use in promotions and discipline also brings in other authority listed in Section 2(11), including, at the least, effective recommendations for those actions. Accordingly, I find that Lead IR Techs Mohindra and Lozano are supervisors within the meaning of the Act. See *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006). Moreover, the evidence set forth above, as well as evidence that the Lead IR Techs arrange for and run quarterly meetings of employees (Tr. 447-448), including the one discussed later in this decision, shows that they have the actual or apparent authority to speak and act on Respondent's behalf. They are thus also agents of Respondent under Section 2(13) of the Act. See *Bill's Electric, Inc.,* 350 NLRB 292, 292, fn.2 (2007).[1]

Lauster's Employment Record

Lauster's December 20, 2019, written evaluation rated him as "always exceeds the standard" for employee dependability, attendance, cooperation in the workplace and interpersonal skills. His overall summary was deemed "usually exceeds the standard," with the following narrative: "[Lauster] is very reliable & flexible. He's willing to accommodate the scheduling needs of the center by coming in early or staying late. [He] has a very cheerful attitude & is willing to do anything that is asked of him." In the section titled "future training and growth," the evaluation states that Lauster "needs to work on being more focused in the procedures, by paying attention & anticipating the needs of the case & physician." The evaluation was prepared by then-Director of Nursing Shannon Genovese and signed by Administrator Ehret. G.C. Exh. 5, Tr. 329-332, 343. Genovese remained employed by Respondent until after Lauster's termination and worked closely with Lauster during that time. She testified that Lauster's work performance throughout the remainder of his employment was consistent with what she wrote in that evaluation. Tr. 335.

There was no other written comment or discipline concerning Lauster's work and no written or documented verbal warnings issued to him from the time of the above evaluation to the date of Lauster's termination on November 18, 2020. This despite Respondent's handbook policy specifically providing that, [i]n most cases [Respondent] will use progressive disciplinary actions before dismissing employees." The handbook policy also provides for the use of disciplinary action to "fairly and impartially correct behavior and performance problems early on to prevent recurrence." The policy specifically provides for "verbal warning, written warning, suspension with or without pay, and termination of employment, depending on the severity of the problem and the

[1] In its answer Respondent denied that the Lead IR Techs were supervisors and agents and it makes a cursory reference in its brief (R. Br. at 19) to the alleged failure of the General Counsel to prove the allegations. But Respondent does not discuss the facts and the legal issues in any detail, thus failing completely to rebut the General Counsel's evidence of supervisory and agency status.

frequency of occurrence." Finally, the policy specifically lists a number of offenses that justify immediate termination "without observing other disciplinary action first," such as workplace violence, harassment, theft, insubordination, vandalism, unauthorized use of company property, indiscretion about work history, divulging confidential information, misrepresentation, and presence on company property during non-work hours. G.C. Exh. 2.

The November 5, 2020, Meeting

On November 5, Supervisors and Lead IR Techs Mohindra and Lozano led a meeting with interventional radiology employees to discuss inventory and related issues. They prepared an agenda and checked beforehand with Ehret, who cleared the agenda and added a new topic, which reads as follows: "Brandon would like us to rotate into OR when C-arm is needed during our working hours. Chelsy will run C-arm (early) cases." G.C. Exh. 4, Tr. 34-35, 431, 448-449. Ehret did not attend the meeting. Among the other people present at the meeting were Dr. Mohindra and employees Marty Lauster, Amber Rollins and Cassandra Shephard, who recorded a good part of the meeting and the recording was received in evidence as G.C. Exh. 10(c). I have listened to the recording and the findings below are based on my assessment of the recording, along with testimony about the meeting.[2]

At some point, Danielle Mohindra raised the C-arm issue, stating that when the C-arm was to be used during hours when no IR Techs were at work, Chelsy Perry, a nurse, was to run the C-arm. Lauster immediately objected. He stated that Chelsy Perry was an RN and not allowed to run the C-arm, adding that that would be illegal. Lauster's concern was that Perry was not licensed to run the C-arm like the IR Techs. Tr. 122-123, 176,181-183, 198. At that point, other IR Techs, including Amber Rollins, joined in, supporting Lauster's position. See Tr.181-183, 202-204, 207, 243, 254-255.[3]

[2] Lauster testified that the recording does not capture all of what was said at the meeting and certainly what is recorded often reflects many people talking at the same time. Tr. 205-207. Shepard also acknowledged some difficulties in understanding what was said and by whom. Tr. 243-255. My assessment of the recording confirms Shephard's view. Most of the recording deals with inventory issues but certainly there is a discrete part that deals with the C-arm issue and what would happen if nurses and not IR Techs were permitted to run the C-arm.

[3] On cross-examination of Lauster, Respondent's counsel questioned whether the recording reflected Lauster stating, as he testified, that it would be illegal for a nurse to run the C-arm would, emphasizing that it was Rollins who said it would be "prosecutable." It is true that the recording reflects a lot of people speaking at the same time and Rollins, who was closer to the site of the recording device than Lauster, was probably more clearly understood than Lauster. But Lauster was adamant in insisting that he said letting an unlicensed nurse run the C-arm would be illegal. I would tend to credit him because I found him credible in other parts of his testimony, as discussed later in this decision. I also note that Lauster was acutely protective of his licensed status, having previously spoken with his fellow IR Techs about license compliance issues (Tr. 124) and later contacting the director of the State office of radiology to

After a rather heated discussion dealing with concerns over the use of unlicensed people running the C-arm, Lozano summed up the Respondent's position. She told the employees that "[I]f that's the case", then the IR Techs should be prepared to start coming in early and staying late "so you know before we go down this rabbit hole, I'm just pointing it out." GC. Exh. 10(c).

Those comments prompted a discussion about coming in early and staying late and what the employees should do about their hours. This is clearly reflected in the recording. Also clearly reflected in the recording is Dr. Mohindra's lengthy statement in support of paying overtime to the IR Techs if they were required to come in early and stay late. G.C. Exh. 10(c).[4] That this was an important issue for the employees is also shown by Lauster's credible testimony that he had had previous discussions about the issue with a number of people, including Supervisor-Lead IR Techs Mohindra and Lozano, and was told that Respondent did not want to pay overtime to the IR Techs. Tr. 123-124.[5]

Ehret testified that normally one of the Lead IR Techs would report to him what happened in similar employee meetings. Tr. 32. And he specifically admitted that, after the November 5 meeting, Danielle reported what had happened in the meeting to him in person. Tr. 35.[6]

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discuss the legality of using a non-licensed person for this procedure. Tr. 182, 187. But, even without that specific reference, it is clear that Lauster was the person who raised the issue and prompted the entire discussion dealing with employee objections to using unlicensed personnel to run the C-arm.

[4] The General Counsel alleges that the recording has Danielle Mohindra stating that she would ask Ehret how the employees could manage their hours and report back to them. That may well be, but I cannot make that finding with exactitude, although I did hear someone speaking with authority say, "I will ask him that." I also note that the written version of the recording set forth in Respondent's brief omits the part, which is significant in my view, where the employees questioned their hours and where Dr. Mohindra spoke favorably about paying overtime to the IR Techs.

[5] I credit Lauster's firm testimony on this issue. Mohindra and Lozano testified they could not "recall" such conversations. Tr. 435, 510. My determination on this issue is also confirmed by my assessment of the credibility of these witnesses discussed later in this decision.

[6] Despite the above clear admission by Ehret, he later suggested he knew nothing about the discussion of the C-arm in the November 5 meeting. Tr. 567. Mohindra and Lozano likewise denied telling Ehret about the meeting or its contents. I do not credit the testimony that Ehret was not told of the discussions in the November 5 meeting about the objections by the IR Techs to the use of non-licensed personnel to run the C-arm and particularly the fact that Lauster raised the issue. I find it implausible that such an important and controversial issue, including the comments of Dr. Mohindra about permitting overtime for IR Techs, would not have been reported to Ehret, especially since he was the one who put the issue on the agenda for the meeting. The

The Termination of Lauster

After the November 5 meeting, which was on a Thursday, Lauster worked the next day, Friday, but did not work the entire next week because of a medical issue. He returned to work on Monday, November 16, 2020. Tr. 124-125. He was terminated at the end of the work day on Wednesday, November 18, 2020.

At the end of his workday on November 18, Lauster was summoned to Ehret's office, where they were joined by Ehret's aide, Chris McGlaughlin. At the termination meeting, Ehret told Lauster, "We're all adults here. It's clear you don't want to be here, so we're going to make our separation here now." Lauster responded, "why don't we call it a constructive discharge?" Tr. 134-135. Ehret then confirmed the termination and told Lauster to collect his things and leave. Ehret did not provide Lauster with a specific reason for the discharge and raised no performance issues in the meeting. Tr. 135-136, 186.

The above is based on the credible, direct and clear testimony of Lauster. McGlaughlin did not testify and Ehret's testimony on what was said in the interview was vague and frankly meaningless. According to Ehret, he and Lauster discussed "the continued digression and lack of progression in the skill work . . . there was no improvement and it was actually going backwards." Tr. 94. Ehret also testified that he told Lauster he was terminated and he escorted him out of the facility. Tr. 566-567. He did not dispute Lauster's testimony that he did not give Lauster a specific reason for the termination. And Ehret conceded that, when he told Lauster it appeared that he did not want to be there, Lauster disputed that and said "yes, I do." Tr. 556-557.

Credibility Determinations as to What Really Happened on November 18, 2020

Danielle Mohindra testified that, during a procedure on November 18, she observed Lauster taking an emergency flashlight off the wall and playfully shinning it into a nurse's eye. Tr. 418-421. She did not mention the matter to Lauster at the time and she also testified that she did not remember anything else about "that procedure that day." Tr. 424. She did, however, mention the flashlight incident to Ehret later in the day, and, at his request, wrote up the incident. The document was titled "Employee Write Up," dated November 18, 2020, and signed by Brandon Ehret. It cited Lauster for a violation of unspecified "safety rules." The write up also stated that the nurse, who was not identified in the write-up, asked Lauster to "stop two different times." G.C. Exh. 6, Tr. 94, 424, 425. Mohindra never discussed the write-up with Lauster. Tr. 428.

According to Lauster's credible, direct, and clear testimony, the write up was not given to Lauster in the termination meeting. He did not even see the document until shortly before the hearing. Tr. 132, 167. Nor was the substance of the write-up

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contradictions on this issue within Ehret's own testimony and between his testimony and that of Mohindra and Lozano show that their denials are not credible. This matches their inconsistencies on other matters, which I discuss later in this decision.

discussed in the termination meeting. Tr. 134-136. Ehret did not contradict that testimony of Lauster. He testified he could not recall whether the document was given to Lauster or even whether the subject matter was discussed in the termination interview. Tr. 94-95. Had this topic been discussed it would have been obvious that the person doing the termination would have recalled the matter. Significantly, Ehret never investigated the incident by talking to either Lauster or the nurse involved in the alleged incident or anyone else in the room during the procedure. All of this casts serious doubt on whether the flashlight incident was a reason for the discharge or even whether it occurred as reflected in the write-up that was not provided to Lauster.

I also have doubts about Mohindra's testimony with respect to the flashlight incident itself, particularly the part included in the write-up that stated the nurse told Lauster twice to stop shinning the flashlight in her face. None of the other participants in the procedure corroborated Mohindra on this matter.

Lauster denied deliberately shining a flashlight in the eyes of the nurse, who was identified as Leyda Enid Feliu Corchado (herein referred to as Feliu or Nurse Feliu). Tr. 135. He testified that he retrieved the flashlight that was on the wall for use in an emergency because Nurse Feliu asked him to retrieve it. She needed to check to see if it worked because it had previously been inoperative. He took it to her and it was turned on to see if it worked and they both agreed that it did. The whole incident, according to Lauster, lasted less than two minutes and neither Mohindra nor Lozano said anything to him about the matter. Tr. 129-131. Indeed, Mohindra admitted she did not intervene to tell Lauster to stop (Tr. 462), countering any suggestion on her part that this was a safety issue. Mohindra never talked to Lauster about the incident. Nor did she even talk to Nurse Feliu. Tr. 465.

Nurse Feliu supported Lauster's version of the incident. Feliu, who was employed by Respondent at the time of the hearing and testifying against its interests, was for that reason alone a reliable witness. But her testimony is also very reliable because she was the subject of the alleged impropriety. She testified that the statements in the write-up were not accurate. Tr. 311. Feliu also testified that she asked Lauster to retrieve the emergency flashlight from off the wall in the room and bring it to her because she wanted to see if it worked, knowing that it had not previously been working. Feliu asked Lauster to turn it on toward her so that she could see if it worked. He did and the flashlight worked so she told him to put it back, which he did. Feliu denied that she told Lauster to stop shinning the flashlight in her eyes, even "one time." Tr. 309-312. According to Feliu, whose testimony survived cross-examination, the entire incident lasted some 30 seconds and no one mentioned the incident at the time. Tr. 306-310, 321. This is not only contrary to the description in the Lauster write-up, but it is also in substantial accord with Lauster's testimony, notwithstanding a minor discrepancy between the two witnesses as to whether Lauster handed Feliu the flashlight or simply turned it on so she could see that it worked.

The testimony of Nurse Genovese, who was also present during this procedure, is consistent with that of Lauster and Nurse Feliu and contrary to that of Mohindra. See Tr. 336-341. She specifically denied that Feliu told Lauster to stop shinning the flashlight in her eyes. Tr. 341. Genovese reaffirmed her testimony on cross-examination. Tr. 346-352.[7]

Lozano, who was present during the procedure when the Feliu flashlight incident allegedly occurred, testified that she did not observe the incident as described by Mohindra. She specifically denied hearing Feliu tell Lauster to stop flashing it into her eyes twice. Tr. 522, 540. Because, as discussed later, she described another incident involving the flashlight during the same procedure and because she was in the room during the whole procedure and Mohindra was not, it would have been likely, if the Feliu flashlight incident had occurred as Mohindra described it and had it been deemed significant, Lozano would have observed it.[8]

Based on the above, I do not credit Mohindra's testimony as to what happened during the flashlight incident. I also find that the write-up, G.C. Exh. 6, is not an accurate description of what happened during the procedure depicted in the write-up. My decision to discredit Mohindra is also based on another problem I had with her testimony about another matter, which I believe casts doubt on her overall reliability as a witness. That matter dealt with Mohindra's testimony about what was discussed during the November 5 meeting, which was inconsistent with a pre-trial statement she provided to the Board. In her affidavit she had stated that the only topic of discussion in the November 5 meeting was inventory. But she conceded during the trial that there was discussion about having a nurse use the C-arm being "prosecutable." Tr. 453-454. In any event, as to the flashlight incident, I credit the testimony of Lauster, Feliu, and Genovese over that of Mohindra. In short, the incident was unworthy of discipline or discharge. It was not even an impropriety.

Lozano did testify about two other things that happened during the same procedure—seeing Lauster do "hand puppets on the wall," using the flashlight (Tr. 502); and not running the C-arm properly so that Mohindra had to take it over for the second half of the procedure, which, according to Lozano, was "unusual." Tr. 528, 532. Lozano also testified that Lauster did not properly set up the room for the last procedure of the day. Tr. 503-504. She reported all three of these perceived problems to Ehret at the end of the day. Tr. 504-505, 533-534.

[7] I found no reason to doubt Genovese's testimony because, as counsel for Respondent pointed out (Tr. 352-354), a description of the incident was not included in her pre-trial affidavit. There certainly was no inconsistency and Genovese's testimony was corroborated by other witnesses, as indicated above.

[8] There is also some doubt whether Mohindra was even in the room when the flashlight incident took place. She normally leaves work at about 2 pm (Tr. 538-539) and both Lauster and Feliu testified that Mohindra was not in the room when the flashlight incident took place. See Tr. 190-191, 309, 321-322, 595.

I did not find Lozano a reliable witness on what she reported about Lauster on November 18. Her description of the hand puppet incident was not only not corroborated by Mohindra (she said she did not see it, Tr. 460), but Lozano was seriously undercut on that issue when counsel for General Counsel questioned her again on re-cross-examination. See Tr. 544-546. Nor did anyone else corroborate Lozano on the puppets on the wall allegation. Lauster denied doing what Lozano alleged (Tr. 136) and Genovese and Feliu did not see what was alleged; indeed, Feliu said the room was too bright for the shadows described by Lozano. Tr. 323, 339-340. Lozano, who admitted the hand puppets incident lasted for only "a minute or two" (Tr. 546), did not intervene to stop Lauster from doing the puppets or speak to him at all about the matter. Tr. 545. This even though Ehret testified that Lozano had the authority to address the situation right then. Tr. 83.[9]

I found it even more significant that Mohindra did not corroborate Lozano on the latter's testimony that, during the same procedure involving the puppets on the wall, Mohindra had to take over the C-arm for Lauster for the second half of the procedure. If that had happened, it would certainly have been serious enough—Lozano called it "unusual"—to warrant testimony about the matter from the Lead IR Tech who had to take over that procedure. On the contrary, not only did Mohindra not corroborate the charge, but Lauster specifically denied it. Tr. 594-595. Nor did anyone else support Lozano's testimony in this respect, even though there were other people in the room at the time. Finally, Ehret did not mention being told by either Lozano or Mohindra about Mohindra having to take over the C-arm. Because, as Lozano testified, what Mohindra did was so "unusual," if it had happened and been reported to Ehret, as Lozano testified, it certainly would have been mentioned by Ehret in his testimony.[10]

Ehret confirmed that, at the end of the day on November 18, Lozano and Mohindra made separate reports to him about Lauster. According to Ehret, Lozano came to his office first and told him that Lauster was "making hand puppets on the wall with a flashlight" during one procedure and had set up the room improperly in the other. But he could not recall any of the details beyond that. Tr.82-83. Ehret considered the hand puppet incident a potential safety problem and, at this point, made a decision to terminate Lauster. He instructed his aide, Chris McGlaughlin, to prepare the termination email for Lauster's discharge. Tr. 86, 89-91. He also told Lozano to go back to the room, although it is not clear for what purpose. See Tr. 87-88. Oddly enough, even though, at this point, Ehret supposedly made his discharge decision, he did not have Lozano document her view of Lauster's alleged improprieties (Tr. 86, 565), as he did Mohindra's view of a different alleged impropriety, as shown below.

[9] Lozano seemed confused about when this procedure took place, at one point fixing it during the late morning or early afternoon, contrary to her pre-trial affidavit, which fixed the time as the first procedure of the day. Tr. 528-529.

[10] Because of Lozano's general unreliability as a witness, I specifically reject her testimony about Lauster's alleged failure to properly set up the room in the final procedure of the day. Lauster specifically denied he did so incorrectly (Tr. 164-165) and no one else supported Lozano's testimony in this respect.

After that, within 5 minutes, according to Ehret, Danielle Mohindra came into Ehret's office to report that Lauster had shone a flashlight into a nurse's eyes, as described above. And he told Mohindra to prepare the write-up that has been previously discussed. Tr. 91-93. Ehret did not speak to the nurse who was involved in the incident. Tr. 93.

Ehret testified that his discharge decision was based on a long list of alleged deficiencies, most of which were of long duration and did not occur on November 18 and none of which were mentioned in the termination interview with Lauster. Those included: focusing during cases, dropping wires, doodling and drawing figures with a marker, not progressing properly, being a distraction, falling asleep during a meeting and in the nurse's office, shinning an emergency flashlight, and setting up a room incorrectly. See Tr. 63-66. Nor, except for the flashlight incident, were any of those alleged deficiencies memorialized in a written documentation. Tr. 66-67. According to Ehret, a "majority" of these problems conveniently occurred after Lauster's favorable evaluation since that evaluation had not mentioned the deficiencies alleged by Ehret. Tr. 67. Lauster credibly denied the allegations or that the alleged deficiencies were the subjects of talks or warnings by Ehret. Tr. 136-138, 597. Genovese, who had prepared Lauster's favorable evaluation, confirmed that the performance of Lauster, with whom she worked regularly until his discharge, remained the same as she noted in that evaluation. Tr. 335.

I found Ehret's testimony about Lauster's alleged problems, which Ehred admitted were not mentioned to Lauster in the termination interview (Tr. 94), completely unreliable. It was an obvious after-the fact attempt to buttress the vague and unspecified reason given for the discharge at the time. As indicated, the November 18 write-up of Lauster for the flashlight incident was the only written documentation of his alleged failings and he was not even shown or presented with that write-up—or even asked about his version of the incident set forth in the write-up.

In contrast, two other contemporaneous discharges, one for Lacy Richardson on December 6, 2019, and another for Melania James on January 16, 2020, were supported by lengthy write-ups dated the same day as their discharges. Tr. 95-101, 104-107, G.C. Exh. 7. Those write-ups detailed the shortcomings of the employees in the same manner as Ehret discussed Lauster's shortcomings in his testimony. In fact, James had violated patient safety, as allegedly also had Lauster (Tr. 106). But Lauster's write-up is limited to the flashlight issue, which, as mentioned above, was not an accurate reflection of the incident. There was no detailed listing of performance failures in Lauster's write-up as there were in the write-ups of Richardson and James. The difference in the write-ups shows that when Respondent wants to support a discharge, it does so in a well-supported documentation, as set forth in its handbook disciplinary policy. Lauster's situation was not handled that way. In fact, his termination information supplied by the Respondent in a subpoena says nothing about patient safety and appears to be incomplete or inaccurate. See Tr. 106.

Because the testimony of Lozano, Danielle Mohindra, and Ehret about what happened on November 18, discussed above, was so contradictory, I cannot rely on any of their testimony on the matter. I found more reliable the testimony of Lauster, Feliu, and Genovese. Indeed, the testimonial unreliability of Ehret, Lozano and Mohindra about what happened on the day of the discharge leads me to reject their testimony on anything of importance in this case. But there is more. I have already commented about their unreliable testimony about reporting the results of the November 5 meeting to Ehret, in the face of his admission that Mohindra did report the results of the meeting to him. I also note Ehret's unreliable testimony about Lauster's performance issues, which were not mentioned in the termination interview or in documentary evidence. Had those performance issues actually occurred and been deemed serious, they would have been documented, as they were in other instances and in accordance with Respondent's handbook disciplinary policies. And they would have been specifically mentioned in the termination interview.

B. Discussion and Analysis

The Discharge of Employee Lauster

It is settled that an employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee because that employee engaged in protected concerted activity within the meaning of Section 7 of the Act. *Marburn Academy Inc*., 368 NLRB No. 38 (2019), citing and discussing numerous authorities. This part of the case basically presents an issue of motivation. Such cases are analyzed under the causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Under *Wright Line,* the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. The respondent does not meet its burden merely by showing that it had a legitimate reason for its action; it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. But if the respondent's proffered reasons are pretextual—either false or not actually relied on—the respondent fails by definition to meet its burden of showing it would have taken the action for those reasons absent the protected activity. *Hard Hat Services, LLC,* 366 NLRB No. 106, slip op. 7 (2018), and cases there cited.

A showing of pretext also supports the initial showing of discrimination. See *Wright Line*, supra, 251 NLRB at 1088 n.12, citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (where a respondent's reasons are false, it can be inferred "that the [real] motive is one that the [respondent] desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference."). In this respect, it is clear that a trier-of-fact may not only reject a witness's testimony about his or her reasons for an adverse action, but also find that the truth is

the opposite of that testimony. *Hard Hat Services, cited above,* 366 NLRB No. 106, slip op. 7, citing *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). In addition to pretext, animus is shown by shifting or inconsistent reasons offered by the respondent to justify the action and disparate treatment in the application of the adverse action. See *Airgas USA, LLC*, 366 NLRB No. 104, slip op. 2 (2018), enforced, 916 F.3d 550, 560-561 (6th Cir. 2019).

Applying the above principles, I find that Respondent discharged Lauster for engaging in protected concerted activity—his lead role in being the first to object to the use of nurses to utilize the C-arm instead of licensed IR Techs, during the November 5 meeting, thus provoking a lengthy discussion of the matter by employees and supervisors alike. The Respondent does not seriously dispute that Lauster was engaged in protected concerted activity during the November 5 meeting but does dispute that the discharge was motivated by that activity.

The evidence of unlawful motivation, including its causal connection to the discharge, is supported by the timing of the discharge, which came within two weeks of the November 5, 2020, meeting—actually only 4 of Lauster's work days. Contrary to Respondent's contention, the requisite knowledge is established by the presence at the meeting of Supervisors Mohindra and Lozano, whose knowledge is necessarily imputed to the Respondent, as well as my credibility determination that they reported the matter to the decision maker, Administrator Ehred. The inference is clear that Lauster's leading role in raising the objection to the use of nurses to run the C-arm and the related support he engendered among the employees was problematic for the Respondent. Lauster's objection prompted a discussion of how the IR Techs were to use their hours, which were obviously limited to prevent overtime, and to a clear statement of support from Dr. Mohindra for overtime for IR Techs, if necessary. In the midst of the discussion, Supervisor Lozano warned employees that they might have to come in early and stay late if they went down the "rabbit hole" of objecting to Respondent's plan to use nurses to run the C-arm. This presented a Hobson's choice for Ehret: Either stick by his guns to have nurses use the C-arm, as was his plan, and deal with the objections initiated by Lauster; or face the pressure to pay overtime to the IR Techs. The obvious solution was to get rid of the person who had initiated the objections to his plan to have nurses use the C-arm. Lauster had raised this matter in the past during discussions with fellow employees as well as Supervisors Lozano and Mohindra. Lozano's "rabbit hole" remarks at the November 5 meeting suggest a level of animus against employee objections to Respondent's working conditions, but it is also well settled that "[t]iming alone" supports animus as a motivating factor in an employer's adverse action. *NLRB v. Rain-Ware, Inc.,* 732 F.2d 1349, 1354 (7th Cir. 1984).

Other factors supporting a finding of discrimination include the following: No specific reason was given to Lauster for the termination and no investigation was done of the flashlight incident that was the subject of a write-up that was not even shared with Lauster in the termination interview. Nor were the other alleged deficiencies on the day of the discharge investigated. As the Board has stated, "An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the

employer's motive was unlawful." *West Maui Resort Partners,* 340 NLRB 846, 849 (2003), citing authorities.

Moreover, Administrator Ehret, who made the discharge decision, testified as to other shifting and contradictory reasons for the discharge. None of these other reasons were either mentioned to Lauster at the time of his discharge or documented, as they were, in great detail, in the discharges of other employees, thus showing disparate treatment. Finally, Lauster was discharged without regard to the progressive discipline and other provisions of Respondent's disciplinary policy as set forth in its handbook. Accordingly, I find, consistent with my earlier credibility determinations, that the testimonial reasons offered by Ehred for Lauster's discharge were pretexts intended to conceal the real reason for the discharge—Lauster's protected concerted activity. See *Airgas*, cited above, as well as *David Saxe Productions, LLC and V Theater Group, LLC*, 370 NLRB No. 103, slip op. 21, 35 (2021) and *Security Walls, LLC*, 371 NLRB No. 74, slip op. 4 (2022).

My finding of pretext—that the reasons advanced either do not exist or were not relied on—of necessity means that Respondent has not met its rebuttal burden and the "inquiry is logically at an end." *Thermon Heat Tracing Services, Inc.*, 320 NLRB 1035, 1038 (1996), citing *Wright-Line*, supra. In these circumstances, I find that, by discharging Lauster, Respondent violated Section 8(a)(1) of the Act.

The Johnnie's Poultry Allegation

On January 11, 2021, a charge was filed with the Board on behalf of Lauster, alleging that he had had been unlawfully terminated for engaged in protected concerted activity. After receiving a copy of the charge, Ehret learned that employee Cassandra Shepard had recorded the meeting of November 5, 2020, that had spawned Lauster's charge. On January 28, 2021, Ehret approached Shepard in a hallway at the facility and asked if she could provide him with the recording. She readily agreed and she later emailed him a copy of the recording. Tr. 36-37, 237, 287.[11]

Putting aside the hyperbolic part of the General Counsel's assertion—that Ehret "forcefully interrogated" Shepard (Tr. 272), the basis of this allegation is that the brief conversation described above and Shepard's voluntary action in turning over the recording to Ehret violated the requirements for the permissible questioning of employees during an unfair labor practice investigation in *Johnnie's Poultry*, 146 NLRB 770 (1964). Thus, according to the General Counsel, Respondent violated Section 8(a)(1) of the Act. Permissible questioning in those circumstances must be free from coercion and the employer must affirmatively tell the employee the purpose of the questioning, that the employee's participation is voluntary, and that there will be no reprisals based on the employee's participation. Id. at 774-775.

[11] The above is based on the mutually corroborative testimony of Ehret and Shepard, even though there are minor differences in their testimony about the conversation.

I find no violation because *Johnnie's Poultry* does not apply in this situation. Ehret's request for the recording was not an interrogation in the sense that he sought information related to protected activity within the knowledge of the person questioned. The danger in such interrogation and what makes it coercive is that, when such information is uncovered, it is most useful for possible future discrimination. That is not the situation here. Ehret sought the recording of an open meeting attended by both employees and management, presumably to get an accurate reading of what was said at the meeting. There was no attempt to get anything more than a record of openly discussed matters and there was no pressure or coercion in the request. Rather, this case is governed by the Board's dismissal of a *Johnnie's Poultry* allegation dealing with a similar attempt to obtain open information—in that case, a request of employees to provide an affidavit to the employer's attorney about a meeting between employees and management that was the subject of a charge. See *Safelite Glass*, 283 NLRB 929, 950-951 (1987). In *Safelite,* the Board cited *Rossmore House,* 269 NLRB 1176 (1984), for the proposition that questioning must be considered in all the circumstances to determine whether it is coercive. The Board also determined that the request in *Safelite* was not calculated to inhibit employees from engaging in protected activity and did not interfere with the Board's investigatory processes. The same applies here. Accordingly, the alleged violation of Section 8(a)(1) of the Act under *Johnnie's Poultry* is dismissed.[12]

Conclusions of Law

1. By discharging employee Martin Lauster because of his protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

2. The above violation constitutes an unfair labor practice within the meaning of the Act.

3. The Respondent has not otherwise violated the Act.

Remedy

Having found that Respondent engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist from its unlawful conduct and take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice.

[12] On March 1, 2021, the Board invited briefs in *Sunbelt Rentals, Inc.,* 370 NLRB No. 94 (2021), on whether *Johnnie's Poultry* should be overruled and, if so, what the standard should be for employer questioning of employees in the preparation for a defense to an unfair labor practice allegation.

Since Respondent unlawfully discharged Martin Lauster, I shall recommend that it must offer him reinstatement to his former job or, if that job no longer exits, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall also make Lauster whole for any loss of earnings and other benefits he may have suffered as a result of the unlawful discrimination against him. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Lauster for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings, with interest. In accordance with *AdvoServ of New Jersey*, *Inc.*, 363 NLRB No. 143 (2016), Respondent shall compensate Lauster for any adverse tax consequences of receiving a lump sum back pay award and shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file, with the Regional Director of Region 25, a report allocating the backpay to the appropriate calendar year. In addition, in accordance with *Containerboard Packaging-Niagara*, 370 NLRB No. 76, as modified in 371 NLRB No. 25 (2021), Respondent is ordered to file, with the Regional Director for Region 25, a copy of Lauster's W-2 form reflecting the backpay award.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[13]

ORDER

Respondent, Capitol Street Surgery Center, LLC, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees for engaging in protected concerted activity under Section 7 of the Act.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this order, offer Martin Lauster

[13] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make Martin Lauster whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Martin Lauster for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. Also file with the Regional Director for Region 25 a copy of Lauster's W-2 form reflecting the backpay award.

(d) Within 14 days from the date of this order, remove from its files any reference to the unlawful discharge of Martin Lauster, and, within 3 days thereafter, notify him in writing that is has been done and that the unlawful action will not be used against him in any way.

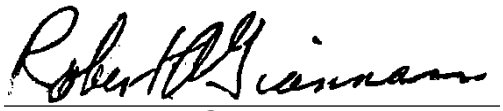
(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order

(f) Within 14 days after appropriate notification by the Region, post, at Its Indianapolis, Indiana facility, copies of the attached notice marked "Appendix A."[14] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2021.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated at Washington, D.C., May 12, 2022.



Robert A. Giannasi
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us or your behalf.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and WE WILL NOT do anything to interfere with your exercise of that right.

YOU HAVE THE RIGHT to freely bring matters and complaints about wages, hours and working conditions to our attention and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT discharge or otherwise discipline employees for the exercise of the above rights or because of their other protected concerted activities under Section 7 of the Act.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL offer Martin Lauster immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make Martin Lauster whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against him.

WE WILL remove from our files any references to the unlawful action taken against Martin Lauster, notify him that this has been done, and that that unlawful action will not be used against him in any way.

WE WILL compensate Martin Lauster for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director a copy of the corresponding W-2 form reflecting the backpay award.

CAPITOL STREET SURGERY CENTER, LLC
(Employer)

Dated_____By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Minton-Capehart Federal Building, 575 N. Pennsylvania Avenue, Room 238,
Indianapolis, IN 46204-1577
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-271204 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTIE OF COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 991-7644.